United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1597

United States Court of Appeals

FOR THE SECOND CIRCUIT

WILLIAM W. MEED,

Plaintiff-Appellant,

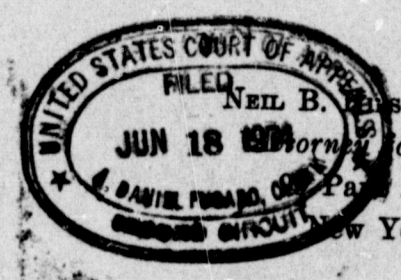
—against—

LOUIS FRANK, as Police Commissioner of Nassau County (Successor to FRANCIS B. LOONEY, former Police Commissioner of Nassau County), and THE NASSAU COUNTY POLICE DEPARTMENT,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT



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Preliminary Statement

This is an appeal from an order of Judge Mark A. Costantino, of the Eastern District of New York, granting defendants-appellees'[1] motion to dismiss the complaint in this action on the grounds that (i) the action is untimely and (ii) the action is barred by the principles of *res judicata*. The order and memorandum of Judge Costantino are reported at —— F.Supp. —— (E.D. N.Y. 1974), and

[1] Since the captions of related actions brought by plaintiff-appellant William W. Meed in the New York State courts differ from the caption of this action, for ease of reference the defendants in this action as well as in the various state court actions are hereinafter referred to as the "Police Department".

are set forth at page 41A of the Appendix[2] filed herewith to this Court.

Statement of Issues Presented

1. If a complaint sets forth facts sufficient to establish a federal question founded upon the United States Constitution, should a motion to dismiss the complaint on the grounds that the action was not timely instituted based upon other jurisdictional allegations contained in the complaint be denied?

2. If a complaint presents issues which have not been presented, litigated or decided in related State Court actions, should a motion to dismiss the complaint on the grounds of *res judicata* be denied?

Statement of the Case

The complaint in this action arises from the dismissal of plaintiff-appellant William W. Meed (hereinafter referred to as "Meed") as a member of the Nassau County Police Department (hereinafter referred to as the "Police Department") and termination of his participation in its pension program after more than fifteen years of unblemished service.[3]

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[2] References to pages of the Appendix are hereinafter designated as "—A".

[3] On or about February 1, 1953, Meed was appointed to the Police Department, a civil service position, following his successful completion of a competitive civil service examination and a thorough investigation of his character and background. In accordance with the rules in effect at the time of Meed's appointment, the first six months of his service with the Police Department were probationary; thereafter his membership in the Police Department was a permanent civil service position. From June, 1951, to January, 1953, Meed served without incident as a member of the Metropolitan Police Department of Washington, D.C. Prior thereto Meed served with the United States Navy, from which he was honorably discharged.

A. *The charges against Meed*

The facts which led to Meed's dismissal follow: On or about February 20, 1968, Meed was suspended from his duties with the Police Department as a result of charges preferred against him that he had violated specified Rules and Regulations of the Police Department. The charges comprised three specifications. The First specification alleged that Meed acted "in a manner unbecoming an officer and prejudicial to the good order . . . of the Police Department" by shoplifting "two one pound cans of coffee, a rubber bath mat and a package of sponge cloths from B. Altman and Company." The Second and Third specifications alleged, respectively, that on two occasions Meed failed "to obey the directions of a Superior Officer by refusing to submit a written report of his activities" at the time and place of the alleged shoplifting.[4]

It should be noted at this point that no criminal proceedings have ever been commenced against Meed founded upon the alleged shoplifting incident or otherwise. Also, Meed did on the first occasion referred to in the Second specification give a full oral statement, of his activities to his superior officers, which was on such occasion reduced by them to a written statement and Meed did on the second occasion referred to in the Third Specification orally affirm his statement, despite the instructions of his then counsel, who was not present on either occasion, to remain silent.

B. *The Police Department hearing*

Thereafter a hearing was conducted by the Police Department, pursuant to New York Civil Service Law § 75(2) and Nassau County Administrative Code § 8-13.0

[4] The charges and the applicable provisions of the Rules and Regulations of the Police Department are set forth in full as Exhibits "A" and "A-1" to this brief, respectively.

(b).[5] Following the hearing, which was characterized by seriously conflicting testimony regarding the alleged shoplifting incident and Meed's submission of written reports and at which testimony materially detrimental to Meed was admitted over the strenuous objection of Meed's counsel, the Trial Commissioner, a Deputy Chief Inspector of the Police Department, issued a report, including determinations and recommendations.[6] In fact, the determinations repeated *verbatim* the words set forth in the original charges except that (i) the introductory clause of each original charge which read "On information and belief" was replaced in each determination with a new introductory clause which read "Substantial evidence was presented at the trial to prove that", and (ii) to the text of each original charge was added a concluding sentence which, in the case of the First specification read "THIS IN VIOLATION OF ARTICLE IX, RULES 10 AND 11 OF THE RULES AND REGULATIONS OF THE POLICE DEPARTMENT, COUNTY OF NASSAU, NEW YORK" (Capitalization, the Trial Commissioner's), and in the case of the Second and Third specification read similarly but referred to Article VI, Rule 9, Subdivision 1 of the Rules and Regulations.

By order dated January 6, 1969, the then Police Commissioner dismissed Meed from his position of patrolman in the Police Department, effective immediately.[7]

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[5] The sub-sections referred to are set forth in full as Exhibits "B" and "B-1" to this brief, respectively. The New York State Civil Service Law and Nassau County Administrative Code are sometimes hereinafter referred to as the "Civil Service Law" and "Nassau Code", respectively.

[6] The report, including the determinations and recommendations, is set forth in full as Exhibit "C" to this brief.

[7] The discipline meted out to Meed, assuming *arguendo* that the charges were well-founded, was under all the circumstances excessive and unevenly dispensed in the light of other disciplinary proceedings conducted by this very Police Department at the time

C. The State Court proceedings

Within a month after his dismissal, Meed commenced a proceeding in the Supreme Court of the State of New York, County of Nassau, pursuant to the provisions of Article 78 of the New York Civil Practice Law and Rules (hereinafter referred to as the "CPLR") and Civil Service Law § 76, to review the proceedings in connection with Meed's dismissal.[8] The proceeding was not decided by the Supreme Court, but was transferred, pursuant to CPLR

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of the original hearing and ensuing New York State court proceedings. *E.g., In the Matter of Short* v. *Looney*, 29 N.Y.2d 578 (1971) (memo), a police officer who allegedly solicited two minor girls to join him in an immoral act was ultimately suspended without pay for fifteen months. In *Fischer* v. *Kelly*, 33 A.D.2d 785 (2d Dept. 1969) (memo), *leave to app. den'd*, 26 NY2d 610 (1970), a detective in the Police Department pleaded guilty to the charge of changing a summons from a moving violation to a non-moving violation, which does not appear on the operator's license, and of having procured other members of the police force to assist him in the preparation and verification of such false summons and sworn complaint, and ultimately was also suspended for a stated period without pay. In *Wright* v. *Looney*, 35 A.D.2d 555 (2d Dept. 1970), *aff'd* 28 N.Y.2d 96 (1971), a police officer who had misappropriated Police Department property by converting approximately two gallons of gasoline to his own personal use and possession was also suspended without pay for a specified period of time. In an unreported matter, Clifford W. Schmidt, a member of the Police Department, who had been charged, among other things, with receiving six bags of cement as a gratuity and transporting them in a Police Department vehicle, all while on duty, following a Police Department hearing, was suspended without pay for ten days. See also, *Matter of Donohue*, 19 N.Y.2d 954 (1967) where the New York Court of Appeals reversed the court below and found that dismissal of a policeman from his position as a State Trooper on the ground of failing to obey a lawful order was excessive as a matter of law.

[8] Following his dismissal, Meed learned for the first time that his counsel, during the period commencing with his suspension, including the hearing, and continuing to the time of dismissal, was in the midst of serious matrimonial difficulties and under indictment for attempted extortion and conspiracy to extort. His counsel was subsequently divorced from his wife and found guilty on the extortion charges.

§ 7804(g), to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, which without opinion confirmed the order dismissing Meed and dismissed the proceeding on the merits. The decision of the Appellate Division is reported at 34 A.D.2d 1620 (2d Dept. 1970) (memo). Leave to appeal to the New York Court of Appeals was denied by the Appellate Division.

After exhaustive investigatory effort,[9] Meed brought a second proceeding in the New York State Supreme Court under Article 78 of the CPLR for a further review of the proceedings which had led to his dismissal or alternatively for a rehearing on the basis of newly discovered evidence. The proceeding was transferred to the Appellate Division, which granted the Police Department's motion to dismiss the renewed proceeding and rendered an opinion which rejected Meed's contentions respecting newly discovered evidence and that the original hearing was required by statute to be conducted by no one other than the Police Commissioner himself. This opinion is noteworthy in that it is the only opinion dealing with matters of substance written by any of the state courts to which Meed brought, or sought leave to bring, proceedings to review his dismissal. The opinion is reported at 37 A.D.2d 847 (2d Dept. 1971). Leave to appeal to the New York Court of Appeals was denied by the Court of Appeals.

Thereafter Meed commenced the instant action in the United States District Court for the Eastern District of New York, from which this appeal is taken.

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[9] Meed had been counseled by his first attorney not to make any effort to investigate the facts surrounding the charge founded on the alleged shoplifting incident or the background and character of the Police Department's principal witness.

ARGUMENT

POINT I

Since the complaint sets forth facts sufficient to establish a federal question founded upon the United States Constitution which was not vulnerable to the Police Department's motion to dismiss on the grounds that the action was not timely instituted, the complaint properly should not have been dismissed by the District Court on those grounds.

A. *District Courts have a duty to read complaints liberally*

It is well established that United States District Courts have a duty to read the complaint in an action liberally "to determine whether the facts set forth justify taking jurisdiction on grounds other than those most artistically pleaded." *New York State Waterways Association, Inc.* v. *Diamond,* 469 F.2d 419, 421 (2d Cir. 1972), and authorities cited therein.

Concededly, the complaint in this action sought to found the jurisdiction of the court below primarily upon the Civil Rights Act, 42 U.S.C. §1983 (1970), and that attempt was vulnerable to a motion to dismiss on the ground that the action was not timely commenced. However, under the policy of liberal construction of pleadings embodied in Rule 8(f) of the Federal Rules of Civil Procedure, a District Court should properly sustain jurisdiction when an examination of the entire complaint reveals a proper basis for assuming jurisdiction other than one that has been asserted and proves defective. *Conley* v. *Gibson,* 355 U.S. 41, 45-8, 78 S.Ct. 99, 102-3 (1957), *Johnston* v. *National Broadcasting Company, Inc.,* 356 F. Supp. 904, 910 (E.D.N.Y. 1973) (quoting *New York State Waterways Association, Inc.* v.

Diamond, supra); *Glodgett* v. *Betit*, 368 F. Supp. 211, 216 (D.Vt. 1973). Indeed, the United States Supreme Court has stated that

> "where the complaint * * * is so drawn as to seek recovery directly under the Constitution * * * the federal court * * * must entertain the suit. * * * The reason for this is that the court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief." *Bell* v. *Hood*, 327 U.S. 678, 681-2, 66 S. Ct. 773, 775-6 (1943).

Thus, if the complaint in this action sets forth facts which establish a proper basis for the court below to assume jurisdiction, other than the Civil Right Act, that court ought properly to have assumed jurisdiction and not dismissed the complaint on the ground that it was not timely commenced. A review of the complaint reveals that it is replete with alleged violations of Meed's constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution. (See, Complaint, Paragraphs 12, 17, 18, 20, 21, 27, 28 and 30 at 7A and 9A-12A). These allegations, although not expressly asserted as the basis of the jurisdiction of the court below, establish the jurisdiction of the court below in respect of this action under 28 U.S.C. §1331 (1966). District Courts have assumed jurisdiction over actions in which the claim to such jurisdiction founded upon constitutional violations was considerably weaker than is the case here. *Wiley* v. *Sinkler*, 179 U.S. 58, 64-5, 21 S.Ct. 17 (1900); *Swafford* v. *Templeton*, 185 U.S. 487, 491-2, 22 S.Ct. 783 (1901).

B. *Complaints may be freely amended to supply a missing jurisdictional amount allegation*

Although the complaint did not contain an allegation regarding the jurisdictional amount, it has been held on

repeated occasions that a complaint may be freely amended to supply a missing jurisdictional amount allegation. See, *e.g. Grove Press, Inc.* v. *State of Kansas,* 304 F.Supp. 383 (D.C. Kan. 1969). In the light of the allegations set forth in the complaint regarding the damages sustained by Meed by reason of his dismissal from the Police Department and from its pension system, as well as his damages arising from his loss of reputation and prestige, there can be no question that Meed has suffered damages in excess of the requisite jurisdictional amount.[10] It is clear that Meed's membership in the Police Department and its pension plan were property rights which are constitutionally protected. In *Snead* v. *Department of Social Services, City of New York,* 355 F.Supp. 764, 769 (S.D.N.Y. 1973), a three-judge court held: "The conclusion is inescapable that plaintiff has a property right in continued civil service employment." See also, *Board of Regents* v. *Roth,* 408 U.S. 564, 92 S.Ct. 2701 (1971), and *Perry* v. *Sindermann,* 408 U.S. 593, 97 S.Ct. 2694 (1972).

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[10] See, e.g., Complaint, Paragraph 24 at 10A. At the time of his dismissal, Meed held the rank of Patrolman, and his basic rate of compensation was $9,495.72 per year. With holiday pay and other adjustments he could reasonably expect to earn in excess of $10,000.00 per year. In addition he received certain group life insurance and medical insurance benefits by reason of his membership in the Nassau County Patrolman's Benevolent Association. His pension provided, among other things, that at age 55 he would receive a retirement allowance computed on the basis of his average compensation for his three final years of service and his total years of service. If Meed had not been dismissed, today he would, if still a patrolman, be receiving compensation at a basic rate of $16,410 per year, which together with holiday pay and other adjustments could reasonably be expected to exceed $18,000.00 per year. Upon Meed's dismissal, his membership in the Patrolman's Benevolent Association, and the insurance benefits he derived therefrom, ceased. Also, Meed's rights to increased retirement allowances under his pension, which would have resulted automatically from his continued service with the Police Department, terminated. The effect of the dismissal on Meed's ability to earn a livelihood has been devastating. Since the time of

POINT II

The complaint presents issues which had not been litigated or decided in the State Court actions and accordingly it was not subject to dismissal on the grounds of *res judicata*.

A. *The allegations in the complaint regarding the Trial Commissioner's failure to make finding of fact presented issues that had not been litigated and decided in the state courts*

This court has stated that an action shall not be barred by application of the principle of *res judicata* unless "it could be fairly said that the issues still present had been litigated and decided" in prior actions. *McNellis* v. *First Fed. Sav. & L. Ass'n of Rochester,* N.Y., 364 F.2d 251 (2d Cir. 1966).[11] The complaint in the instant action alleged as one of its principal isues that the Trial Commissioner, following the Police Department hearing, failed to make findings of fact, as required by New York Civil Service Law § 75(2) and Nassau County Administrative Code § 8-13.0 (b), and in violation of Meed's constitutional rights of due process and equal prosecution of the laws. (See Complaint, Paragraphs 16 and 17 at 8A and 9A). The consti-

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his dismissal, Meed has been employed by at least five different employers in positions as stock boy, bus boy, waiter, chauffeur and private security guard. His annual compensation has ranged from a low of $1,322.00 to a high of $9,800.00 per year, which he received in his present employment as a private security guard. In addition, Meed has been rejected for other employment because of his dismissal, despite otherwise qualifying for such employment, on numerous occasions. For example, he successfully completed a competitive examination for a position with the United States Post Office, only to be rejected because of his dismissal from the Police Department. He was rejected from employment by at least one nationally known corporation, The Equitable Life Assurance Society of the United States, also because of his dismissal.

[11] Hereinafter cited as *McNellis* and referred to as the "*McNellis* case".

tutional issues raised by the Trial Commissioner's failure to make findings of fact have not been presented to, litigated or decided—either expressly or implied, by any state court which had previously heard, or been petitioned to hear, this matter.

In any consideration of the application of the principle of *res judicata,* a review of the prior proceedings is essential. Accordingly, the issues presented, litigated and decided in the state court proceedings are set forth below in brief summary.

1. The first Article 78 proceeding

In the first Article 78 proceeding, the petition to the New York State Supreme Court adopted a blunderbuss approach. The issues raised in the petition *seriatim* were that the determinations of the Trial Commissioner and Police Commissioner were predetermined, unfair, unreasonable, unnecessary, illegal and unconstitutional; the evidence presented at the hearing was contradictory; the Trial Commissioner failed to make findings of fact and consequently the determination of the Police Commissioner was arbitrary, capricious, illegal and unreviewable; the punishment was predetermined; evidence was admitted at the hearing in violation of the New York and United States Constitutions; the acts of Meed complained of did not constitute violations of the specified Rules and Regulations; the specified Rules and Regulations were unconstitutional; the punishment to Meed was excessive; the determinations of the Trial Commissioner and Police Commissioner were contrary to the weight of the evidence; the Trial Commissioner committed prejudicial error respecting the admission of evidence.

The proceeding was transferred to the Appellate Division and Meed's and the Police Department's briefs to that court

presented to it the following issues. First, were Meed's constitutional rights violated by his superior officers ordering him to give a statement—either orally or in writing and signed by him—regarding his activities at the time and place of the alleged shoplifting incident and using the statement at the hearing. Second, was Meed's guilt regarding the allegd shoplifting incident established by the competent evidence admitted at the hearing. Third, was the punishment imposed on Meed excessive. The Appellate Division, without an opinion, confirmed Meed's dismissal and it dismissed the proceedings on the merits. The Court's order is reported at 34 A.D.2d 620 (2d Dept. 1970).

It is impossible to determine from the decision of the Appellate Division whether that Court upheld the first, second, or third specification of the charges against Meed, or any combination thereof. The most that can be said is that the Court upheld at least one of the specifications, since it is clear that the Court's confirmation of Meed's dismissal could be founded on sustaining any one of the specifications. Hence, the decision of the Appellate Division is not such "a judgment on the merits * * * sufficient to justify application of *res judicata* rules." *McNellis,* supra at 256. In the *McNellis* case the Court reversed the judgment below and concluded that there was no *res judicata* bar to that action based in large measure upon its reasoning that "a reasonable doubt as to what was decided in the first action should preclude the drastic remedy of foreclosing a party from litigating an essential issue [footnote omitted]." *McNellis,* supra at 257.

Meed's application to the Appellate Division for leave to appeal to the New York Court of Appeals, founded upon a restatement of the issues presented to the Appellate Division, was denied without opinion.

2. The second Article 78 proceeding

After an exhaustive investigation of the facts underlying the alleged shoplifting incident and the character and background of the Police Department's principal witness against him, Meed brought the second Article 78 proceeding before the New York State Supreme Court which referred the proceedings to the Appellate Division. Meed's brief and affidavits in support of the proceeding and the Police Department's motion to dismiss the proceeding, originally filed with the Supreme Court and then referred to the Appellate Division, and the Police Department's brief to the Appellate Division presented the following issues. First, was the hearing, which resulted in Meed's dismissal, required to be conducted personally by the Police Commisioner. Second, was there newly discovered evidence sufficient to support the second Article 78 proceeding. Third, were Meed's constitutional rights violated by the admission of testimony of the Police Department's principal witness at the hearing. The Appellate Division granted the motion to dismiss the proceeding and wrote an opinion which was addressed solely to the first two issues presented to it, as summarized above. The Court opined that the contentions raised by Meed respecting the two issues were without merit. It found that the newly discovered evidence was available at the time of the hearing (and presumably, although not expressed in the opinion, was therefore not sufficient to permit the proceeding to withstand the motion to dismiss) and that the hearing was not required to be conducted by the Police Commissioner.[12]

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[12] The opinion of the Court reads in part as follows at 848: "A hearing with full due process protection afforded petitioner [Meed] was *conducted* by a deputy inspector who reported to the Commissioner. In our opinion the hearing tribunal as constituted complied with the Administrative Code of Nassau County and jurisdiction was present." (Emphasis added.) It is clear from the issues presented to the Court, as framed by the briefs and

The opinion is reported at 37 A.D. 2d 847 (2d Dept. 1971) and is set forth in full in Exhibit "D" to this brief.

Thereafter, Meed's application to the Court of Appeals for leave to appeal to that court, based upon a reiteration of the issues presented to the Appellate Division, was denied without opinion. The denial is reported at 31 N.Y. 2d 847 (1971).

B. *The Police Department has the burden of showing that the issues raised in the complaint had been litigated and decided in the State Courts.*

The Police Department, as the party asserting the bar of *res judicata,* has the burden of showing the meaning of the former adjudications. *Hyslop* v. *United States,* 261 F.2d 786 (8th Cir. 1958). Such has been the principle followed in this circuit for more than sixty years. See, *J. B. Sparrow Theatrical Amusement Co.* v. *Mack,* 195 F. 474 (2d Cir. 1912) and *Mc Nellis,* supra at 257, n. 8. In fact, this court has cited the *Mc Nellis* case as holding that "a reasonable doubt as to what was decided by a prior judgment should be resolved against using it as an estoppel." *Northern Oil Company* v. *Socony Mobil Oil Company,* 368 F.2d 384, 388 (2d Cir. 1966).

The decisions of the various New York State courts to which this matter has been presented, or sought to be presented, leave more than a reasonable doubt as to what was decided. This is subject to one exception in the case

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affidavits of Meed and the Police Department, that the above quoted statements were directed to the conduct of the hearing, and were not intended to refer to, or encompass, the failure of the Trial Commissioner to make findings of fact after the conclusion of the hearing, which issue was raised for the first time with the filing of the complaint in the court below subsequent to the decision of the Appellate Division. Meed does not on this appeal challenge the decision of the Appellate Division that the hearing was conducted properly.

of the Appellate Division decision in the second Article 78 proceeding, which was unquestionably directed to issues other than those presented by the complaint in this action. The Police Department having failed to meet the burden of showing the meaning of the former adjudications insofar as the same relates to the issues presented by the complaint in this action and that such former adjudications were sufficient to justify the application of *res judicata* rules to the complaint, the court below misapplied the principles of *res judicata* in dismissing the complaint on the ground that the "decisions [of the state courts] must be given res judicata effect. [Citations omitted]." (At 44A).

C. *The Trial Commissioner's failure to make findings of fact violated Meed's constitutional rights*

The critical significance of the failure of the Trial Commissioner to make findings of fact are pointedly demonstrated in this very matter by the judicial proceedings which ensued upon the conclusion of the proceedings of the Police Department. The judicial proceedings also establish beyond peradventure that the failure of the Trial Commissioner goes to the very heart of the concept of due process and equal protection.

During the course of the hearing the attorney representing Meed took strenuous objection to certain of the testimony presented and evidence admitted. Following Meed's dismissal, as has been seen, Meed sought to annul the determinations of the Trial Commissioner and Police Commissioner through two separate court proceedings including various appeals. Perhaps the principal obstacle Meed had to overcome in these proceedings was the fact that the Trial Commissioner's report was devoid of any findings of fact with respect to any of the three specifications. Thus, Meed was faced with the virtually impossible

task of persuading the State courts that each determination of the Trial Commissioner, taken as a whole, must fall by reason of improprieties at the hearing. In contradistinction, if findings of fact had been set forth by the Trial Commissioner in his report, Meed would have been in a position to demonstrate that one or more of the findings material to the determinations and recommendations of the Trial Commissioner was not proper by reason of any of such improprieties, *e.g.* the finding was not supported by competent evidence.

By way of illustration, if a finding of fact had been made which related to the date on which the alleged shoplifting incident took place and thereafter Meed was able to show conclusively that he could not possibly have been at the scene of the alleged shoplifting incident on that date, then the determinations and recommendations of the Trial Commissioner with respect to the specification founded on the alleged shoplifting incident would of necessity have had to fall. Absent such a finding of fact, the determinations and recommendations of the Trial Commissioner, and the determination of the Police Commissioner based upon them, are insulated from such an attack.

In fact, during the hearing the Police Department's principal witness testified that on January 15, 1968—a month to the day prior to the date of the alleged shoplifting incident —she had observed Meed at the B. Altman and Company store located in Manhasset, Long Island, New York, where the alleged shoplifting incident occurred, formed the impression that he was acting in a suspicious manner, and concluded that he was a shoplifter.[13] Following the hearing, Meed obtained and submitted as exhibits in the second

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[13] Transcript of the portion of the hearing held June 5, 1968, pp. 9, 23-27, 31, 52, and 64-65.

Article 78 proceedings an affidavit of a proprietor of a motel located in upstate New York and a copy of a registration card used by the motel to show that he had been registered at the motel the nights of January 14 and 15, 1968—the same day the Police Departmen's principal witness testified she had seen Meed at the B. Altman and Company store.[14]

D. *The statutes pursuant to which the Police Department hearing was held, and the cases construing them, require that findings of fact be made in connection with hearings such as the Police Department hearing*

The Police Department hearings were required by, and conducted pursuant to, New York Civil Service Law § 75(2) and Nassau County Administrative Code § 8-13.0(b).

Although Civil Service Law § 75(2) has no express provision relating to findings of fact, the courts of the State of New York have consistently held that findings of fact are required in connection with hearings conducted pursuant to that section. See, *e.g.*, *Piper* v. *Lubin*, 4 A.D.2d 812 (3rd Dept. 1957). Cf. *Matter of Elite Dairy Products* v. *Ten Eyck*, 271 N.Y. 488 (1936) (perhaps the leading case in New York on the issue of findings of fact).

In *Klein* v. *Department of Mental Hygiene*, 15 A.D.2d 562 (2d Dept. 1961) (memo) the court expressed the virtually unanimous view of the New York State courts that findings of fact are required in connection with hearings, such as the Police Department hearing, "so that an intelligent review of the determination may be had [citations omitted]."

Nassau Code § 8-13.0(b) provides in relevant part, as follows:

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[14] The affidavits and the copy of the registration card were respectively Exhibits "C" and "C-1" to the affidavit sworn to January 20, 1971, of John P. Dunne, Esq., the attorney who represented Meed in connection with the second Article 78 proceeding.

> "The commissioner may designate a captain to conduct hearings or charges against lieutenants, sergeants and patrolmen and to report *his findings* and recommendations to the commissioner for action thereon." (emphasis added)

A report on the subject of administrative adjudication prepared for the Governor of the State of New York is most illuminating regarding findings of fact in quasi-judicial hearings, such as the Police Department hearing in this matter, and on the reasons which compel such findings to be made in quasi-judicial hearings.[15] Because of its particular relevance to the issue presented by the complaint here regarding the failure of the Trial Commissioner to make findings of fact, a portion of the report follows:

> "Intelligent judicial review of a quasi-judicial determination is possible only if the deciding officer has made findings of fact which show the actual grounds of decision,—findings sufficiently specific so that the reviewing court may judge, first, whether the findings themselves are supported by the evidence in the record of the quasi-judicial hearing and, second, whether the facts so found are legally sufficient to support the determination. Primarily to provide the necessary basis for intelligent judicial review, therefore, the courts have laid down a requirement that such findings of fact be made [citation omitted]. Such findings are required whether or not the departmental

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[15] 1 Benjamin, Administrative Adjudication, 251-261 (1942). The full title of the report is "Administrative Adjudication in the State of New York, Report to Hon. Herbert H. Lehman, Governor of the State of New York, by Robert M. Benjamin, as Commissioner under Section 8 of the Executive Law" (hereinafter referred to as "Benjamin's Report to Governor Lehman").

statute governing the procedure of the particular agency contains specific provision for findings of fact, as some statutes do.

"Since the primary purpose of findings of fact is to afford a basis for intelligent judicial review on the record of the quasi-judicial hearing, the requirement of findings will be imposed wherever such judicial review may be invoked.[16]

* * *

"I come now to the question of the proper content and form of findings of fact. No mechanical formula is possible here; nor is it practicable to attempt to summarize briefly the results of the decided cases passing on the adequacy of particular findings in particular circumstances. The purposes for which findings of fact are to be used on judicial review, stated in the first paragraph of this section, indicate generally what the character of the findings should be. Something more, however, may usefully be said. Findings should ordinarily omit recitals of evidence, and be confined to a statement of what is decided. How much of what is decided should be included in the findings is a more difficult question. A mere finding of ultimate fact (*e.g.*, that an applicant for a license is not qualified

[16] The report went on to consider other reasons for requiring findings of facts to be made in connection with quasi-judicial hearings, at 253:

"Findings of fact serve other purposes besides affording a basis for intelligent judicial review. The obligation to formulate findings, rather than simply to announce a result, tends to assure considered action by the administrative deciding officer. As a corollary, the findings themselves offer some assurance to the parties that the decision has been arrived at rationally, on the evidence; and the findings at least enable the parties to judge for themselves the soundness of the decision, and afford them assistance in deciding whether or not to seek to reverse it on rehearing or judicial review."

by character and experience) will not ordinarily be sufficient to enable a reviewing court to determine whether the evidence supports the finding; and there should therefore ordinarily be findings of the subsidiary facts from which such ultimate facts follow. * * *" (footnotes omitted) (pages 251-253, 255-256)

It is interesting to note that Nassau Code § 8-13.0(b) was originally enacted in 1939[17] without the above-quoted sentence, and that the above-quoted sentence was added in 1943,[18] one year after the date of Benjamin's Report to Governor Lehman.

The issue presented to the court below founded upon the failure of the Trial Commissioner to make findings of fact was not presented to, litigated or decided by, the Appellate Division in the second Article 78 proceeding or by any other state court in which Meed prosecuted an action or to which Meed sought leave to do so. The failure of the Trial Commissioner to make findings of fact was an insuperable obstacle to Meed as he sought relief from the courts and such failure strikes at the very essence of Meed's rights protected by the due process and equal protection of the laws clauses of the United States Constitution.

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[17] As part of L. 1939, Ch. 272, N.Y. Sess. 361, entitled "An act to provide an administrative code for Nassau County in harmony with and supplemental to the county government law of Nassau county."

[18] L. 1943, Ch. 268, N.Y. Sess. 748.

CONCLUSION

The Decision of the Court Below Dismissing the Complaint Should Be Reversed.

Dated: New York, N. Y.
June 17, 1974

Respectfully submitted,

NEIL B. HIRSCHFELD
Attorney for Plaintiff-Appellant
99 Park Avenue
New York, N. Y. 10016
(212) 867-7200

Exhibit "A"

POLICE DEPARTMENT

COUNTY OF NASSAU, N. Y.

Charges and Specifications

Mineola, N. Y., March 8, 1968

To the Commissioner of Police:

I hereby charge

Patrolman	MEED	William	W.	708	Sixth Precinct
Rank	Surname	Given Name	Initials	Shield No.	Command

with: VIOLATING (1) ARTICLE IX, RULES 10 AND 11; (2) ARTICLE VI, RULE 9, SUBDIVISION 1; (3) ARTICLE VI, RULE 9, SUBDIVISION 1 OF THE RULES AND REGULATIONS, POLICE DEPARTMENT, COUNTY OF NASSAU, NEW YORK.

SPECIFICATIONS:

in that 1. On information and belief, Patrolman William W. Meed, Shield Number 708, Sixth Precinct, did, at, about or between 1100 and 1200 hours on February 15, 1968, act in a manner unbecoming an officer and prejudicial to the good order and efficiency of the Police Department by taking and carrying away merchandise consisting of two one pound cans of coffee, a rubber bath mat and a package of sponge cloths from B. Altman and Company, Northern Boulevard, Manhasset, New York, without making payment for same and without the consent of the lawful owner.

Exhibit "A"

2. On information and belief, Patrolman William W. Meed, Shield Number 708, Sixth precinct, did, at, on or about 2000 hours on February 17, 1968, fail to obey the instructions and directions of a Superior Officer by refusing to submit a written report of his activities at and conversations with employees of B. Altman and Company, Northern Boulevard, Manhasset, New York on February 15, 1968, after being ordered to do so by Deputy Chief Inspector Roland W. Grant.

3. On information and belief, Patrolman William W. Meed, Shield Number 708, Sixth Precinct, did, at, on or about 1745 hours on February 19, 1968, fail to obey the instructions and directions of a Superior Officer, by refusing to submit a written report of his activities at and conversations with employees of B. Altman and Company, Northern Boulevard, Manhasset, New York on February 15, 1968, after being ordered to do so by Deputy Inspector Richard W. Votapka.

Complainant ROLAND W. GRANT
Roland W. Grant
Deputy Chief Inspector
Commanding Officer
First Division

Exhibit "A-1"

NASSAU COUNTY POLICE DEPARTMENT
RULES AND REGULATIONS

ARTICLE VI — RULE 9 — SUBD. 1

Rule 9. Members of the Force or Department shall:

1. Promptly obey all lawful orders, instructions, directions and requests of Superior Officers.

   a. Orders of the members of the Force assigned to the Office of Commissioner of Police, Office of Chief Inspector, Office of Chief of Headquarters, Office of Chief of Detectives, or the Office of Chief of District, when so directed, shall be deemed to be the orders of such members' superior and shall be promptly obeyed as such.

RULES AND REGULATIONS

ARTICLE IX-Rule 10

Rule 10. A member of the Department found guilty of violating a rule or regulation of the Department, or of the provisions of any order or orders, or of disobedience of orders, or of cowardice or of intoxication while on duty, or while in uniform, or of conduct unbecoming an officer, or of making a false official communication, record or statement, or a member of the Department convicted in a court having criminal jurisdiction, may be dismissed from the Department, or suffer such other punishment as the Commissioner of Police may direct.

Exhibit "A-1"

Rule 11.

Rule 11. Disorder or neglect to the prejudice of good order, efficiency or discipline, though not specifically mentioned in these rules and regulations, shall be taken cognizance of by the Department, and members of the Department found guilty thereof will be punished, at the discretion of the Commissioner of Police.

Exhibit "B"

NEW YORK CIVIL SERVICE LAW § 75 (2)

2. Procedure. A person against whom removal or other disciplinary action is proposed shall have written notice thereof and of the reasons therefor, shall be furnished a copy of the charges preferred against him and shall be allowed at least eight days for answering the same in writing. The hearing upon such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other person designated by such officer or body in writing for that purpose. In case a deputy or other person is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his recommendations, be referred to such office or body for review and decision. The person or persons holding such hearing shall, upon the request of the person against whom charges are preferred, permit him to be represented by counsel, and shall allow him to summon witnesses in his behalf. The burden of proving incompetency or misconduct shall be upon the person alleging the same. Compliance with technical rules of evidence shall not be required.

Exhibit "B-1"

NASSAU COUNTY ADMINISTRATIVE CODE § 8-13.0 (b)

b. Such members shall be disciplined for the following reasons only:

1. Conviction for any criminal offense;
2. Neglect of duty;
3. Violation of rules;
4. Neglect or disobedience of order;
5. Incapacity;
6. Absence without leave;
7. Conduct injurious to the public peace or welfare;
8. Immoral conduct;
9. Conduct unbecoming an officer; or
10. Any other breach of discipline.

The commissioner may designate a captain to conduct hearings on charges against lieutenants, sergeants and patrolmen and to report his findings and recommendations to the commissioner for action thereon. In case of disciplinary action by fine, not more than thirty days' pay shall be forfeited and withheld for any offense.

Exhibit "C"

POLICE DEPARTMENT, COUNTY OF NASSAU

IN THE MATTER OF CHARGES

—against—

PATROLMAN WILLIAM W. MEED

Case Number 3047

Trial Commissioner Deputy Chief Inspector

Bert E. McConnell

Charges of Violating Article IX, Rules 10 and 11, Article VI, Rule 9, Subdivision 1, and Article VI, Rule 9, Subdivision 1 [sic] of the Rules and Regulations of the Police Department, County of Nassau, New York, having been made to the Commissioner of Police, Police Department, County of Nassau, New York, against Patrolman William W. Meed, Shield Number 708, Sixth Precinct, dated March 8, 1968 by Deputy Chief Inspector Roland W. Grant, Commanding Officer, First Division, and said charges having been served on William W. Meed on the 9th day of March, 1968, and said William W. Meed having appeared before the Trial Commissioner on March 13, 1968 and having been informed by the Trial Commissioner of his legal rights and having thereupon entered a plea of "Not Guilty" to all specifications, a trial of said William W. Meed was subsequently held on said Charges and Specifications before the undersigned, who was duly designated Trial Commissioner by order of the Commissioner of Police dated March

23, 1968, and said William W. Meed having been represented by his attorney, James Edstrom, Esq. and complainant having been represented by Morris H. Schneider, County Attorney of Nassau County; Saul Roth, Esq., Deputy County Attorney, of Counsel, and after hearing the proof and evidence of the parties, Deputy Chief Inspector, Bert. E. McConnell, hereby determines and recommends:

DETERMINATIONS

Specification Number 1.: Substantial evidence was presented at the trial to prove that Patrolman William W. Meed, Shield Number 708, Sixth Precinct, did, at, about or between 1100 and 1200 hours on February 15, 1968, act in a manner unbecoming an officer and prejudicial to the good order and efficiency of the Police Department by taking and carrying away merchandise consisting of two one pound cans of coffee, a rubber bath mat and a package of sponge cloths from B. Altman and Company, Northern Boulevard, Manhasset, New York, without making payment for same and without the consent of the lawful owner. THIS IN VIOLATION OF ARTICLE IX, RULES 10 AND 11 OF THE RULES AND REGULATIONS OF THE POLICE DEPARTMENT, COUNTY OF NASSAU, NEW YORK.

Specification Number 2.: Substantial evidence was presented at the trial to prove that Patrolman William W. Meed, Shield Number 708, Sixth Precinct, did, at, on, or about 2000 hours on February 17, 1968, fail to obey the instructions and directions of a Superior Officer by refusing to submit a written report of his activities at and conversations with employees of B. Altman and Company, Northern Boulevard Manhasset, New York on February 15, 1968, after being ordered to do so by Deputy Chief Inspector

Exhibit "C"

Roland W. Grant. THIS IN VIOLATION OF ARTICLE VI, RULE 9, SUBDIVISION 1 OF THE RULES AND REGULATIONS OF THE POLICE DEPARTMENT, COUNTY OF NASSAU, NEW YORK.

Specification Number 3.: Substantial evidence was presented at the trial to prove that Patrolman William W. Meed, Shield Number 708, Sixth Precinct, did, at, on or about 1745 hours on February 19, 1968 fail to obey the instructions and directions of a Superior Officer by refusing to submit a written report of his activities at and conversations with employees of B. Altman and Company, Northern Boulevard, Manhasset, New York on February 15, 1968, after being ordered to do so by Deputy Inspector Richard W. Votapka. THIS IN VIOLATION OF ARTICLE VI, RULE 9, SUBDIVISION 1 OF THE RULES AND REGULATIONS OF THE POLICE DEPARTMENT, COUNTY OF NASSAU, NEW YORK.

RECOMMENDATION

After careful consideration of the testimony, proof and evidence in this case, it is recommended to the Commissioner of Police of the Police Department, County of Nassau, New York that Patrolman William W. Meed be found guilty of Specifications 1, 2 and 3, as charged and that the Commissioner of Police impose such disciplinary action as he shall deem fit and proper.

Bert E. McConnell
Deputy Chief Inspector
Trial Commissioner

Dated at Police Headquarters
Mineola, New York
December 31, 1968

Exhibit "D"

In the Matter of William W. Meed, Petitioner, v. *Francis B. Looney or His Successor, as Commissioner of Police of the County of Nassau, Respondent.*—Renewed proceeding to review respondent's determination, dated January 6, 1969, which dismissed petitioner from his position as a patrolman in the Nassau County Police Department. Respondent has moved to dismiss the petition upon an objection in point of law. Respondent's motion granted and renewed proceeding dismissed, without costs. Petitioner's dismissal from his position was after a hearing and upon a charge that he had stolen certain items from B. Altman & Co. on February 15, 1968. The dismissal was confirmed by this Court on March 9, 1970 (*Matter of Meed* v. *Looney*, 34 A. D. 2d 620). Petitioner now seeks again to review that determination, on the ground of newly discovered evidence regarding the credibility of the principal complaining witness and upon the additional ground of lack of jurisdiction in that petitioner was not afforded a hearing before the Commissioner of Police of Nassau County. In our opinion, both contentions raised by petitioner are without merit. The newly discovered evidence, including a motel registration card for the nights of January 14, 1968 and January 15, 1968 and an affidavit to the effect that petitioner's car was being repaired from February 3, 1968 to February 12, 1968 was clearly available to petitioner at the time of the hearing. Neither should any evidence as to the complaining witness' credibility, especially from neighbors, have been so late in forthcoming. In our opinion, petitioner has been guilty of gross laches in seeking the instant relief. Moreover, in our opinion, the newly discovered evidence would probably not have produced a different result. Petitioner further alleges that his hearing before a deputy chief in-

spector designated by the Commissioner, and not before the Commissioner himself, was in violation of the Nassau County Administrative Code. This contention is similarly without merit. Subdivision b of section 8-13.0, L. 1939, chs. 272, 701-709 as amd. of the Nassau County Administrative Code gives the Commissioner the unqualified right to designate a trial officer to hear charges against patrolmen and to report his findings and recommendations to the Commissioner for action. A hearing with full due process protection afforded petitioner was conducted by a deputy inspector who reported to the Commissioner. In our opinion the hearing tribunal as constituted complied with the Administrative Code of Nassau County and jurisdiction was present. Hopkins, Acting P. J., Shapiro, Golutta, Christ and Benjamin, JJ., concur.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
CITY OF NEW YORK,
COUNTY OF New York, ss.:

Alfred Bush, Jr., being duly sworn, deposes and says that he is over 18 years of age. That on the 18th day of June, 1974, he served 2 copies of the within Appendix and Brief upon Joseph Jaspan, County Attorney, Nassau County, the attorney for the above-named Appellees, by depositing 2 copies of the same securely enclosed in a post-paid wrapper in a branch depository maintained and exclusively controlled by the United States Post Office at Greenwich & Vesey Streets addressed to said attorney for the Appellees at No. Nassau County Executive Building, Mineola, N.Y. 11501, that being the address within the State designated by him for that purpose upon the preceding papers as the place where he regularly kept an office, and at which place he regularly received mail.

Sworn to before me this
18 day of June, 1974.

Abraham L. Pelles
NOTARY PUBLIC, State of New York
No. 31-9821352
Qualified in New York County
Commission Expires March 30, 1976

Alfred Bush Jr